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No. 69936-9

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Marriage of:

CHIE KAWABATA,

Appellant,

vs.

KRISTOFFER GRANT MORNESS,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JEAN REITSCHEL

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BRIEF OF APPELLANT

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A handwritten signature in black ink is written over a circular stamp. The stamp contains the text "SUPERIOR COURT FOR KING COUNTY" around the perimeter and "JUN 22 1:45" in the center.

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## **I. INTRODUCTION**

The trial court prohibited the mother from relocating with the parties' five-year old son to Osaka, Japan, despite finding that it would be more disruptive for the son to be separated from the mother, his primary parent, who was moving for a better job and to be close to her seriously ill mother, than from his father. The consequence of the trial court's decision would be that primary care would be transferred to the father, who lives in Canada, subjecting the son to the same "detriments" inherent in any move that the trial court relied upon to justify its denial of relocation. As the father admits, nothing other than the mother's proposed relocation, which would give the family a "good quality of life, resources, and opportunities," justifies a transfer of primary residential care from the mother to the father. This court therefore should reverse.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying the mother's request to relocate the child with her to Japan and in entering those specific findings underlined in Appendix A. (CP 170-78)

2. The trial court erred in granting the father attorney fees and in entering those specific findings underlined in Appendix B. (CP 179-81)

### III. STATEMENT OF ISSUES

1. Whether a trial court can prohibit a child's relocation when the objecting parent long ago moved away from the child's current location and there is no basis to transfer primary care from the relocating parent to the objecting parent?

2. When the child's relocation is inevitable, because neither parent will live where the child now resides, did the trial court err in denying the child's relocation when it found that it would be more detrimental for the child to be separated from his primary parent, relocation with the primary parent would provide the family with "significantly greater salary" and a "good quality of life, resources and opportunities," and the only detriments identified by the court - that the child would lose "regular contact" with one parent - were inherent in any move?

3. Did the trial court err in finding based on the "timing" that the mother's request to relocate with the child was in bad faith when the mother's valid reasons to pursue relocation arose after the parties agreed to a parenting plan premised on the mother's residence in Washington?

4. Did the trial court err in awarding the father attorney fees when the court made no finding that the mother's request to

relocate was made to harass or interfere in bad faith with the father's relationship with the child, or to unnecessarily delay or increase the cost of litigation?

#### **IV. STATEMENT OF FACTS**

##### **A. The Father Moved To Canada Before The Child Turned 3, And At Age 5 The Child Has Lived Most Of His Life In The Mother's Primary Care.**

Appellant Chie Kawabata and respondent Kristoffer Morness met in May 2005 through an on-line dating service while both lived in Los Angeles, California. (RP 191) Their courtship was "fast and intense." (RP 482-83) Both were interested in moving to Europe to work and travel. (RP 482-83) Kristoffer, a software engineer, was actively recruited by a company in England. (RP 483) Chie, who works in international human resources, also found employment in England. (RP 484) They moved to Oxford, England, within a week of their marriage in Las Vegas on May 22, 2006. (RP 485; CP 113)

After their son Maximus ("Max") was born in England in February 2008, the parties decided to return to the United States to be closer to their friends and to Japan, where all of Chie's relatives live. (RP 91, 194, 256, 487) Both parties were able to secure employment back in Los Angeles, and the family returned to

California in May 2008, when Max was less than four months old.  
(RP 408, 488)

Soon after moving to California, Chie was offered a better opportunity at Microsoft. (RP 489) Kristoffer was committed to his employer in California, and the parties agreed that Chie and Max, then six months old, would move to Washington. (RP 196, 491-92) Chie and Max moved to Washington in August 2008, and have resided here ever since. (CP 3; RP 196, 708)

The family lived separately for eighteen months. (RP 196) After Kristoffer lost his job in California in February 2010, he divided his time between Canada, where he is a citizen, California, where he continued to pursue business opportunities, and Washington, where Chie and Max lived. (RP 197-98, 496, 505-06) While he lived “on and off” in Washington (RP 496), Kristoffer occasionally drove Max to daycare and took him to the park (RP 509), but Chie and daycare providers continued to provide the majority of Max’s care. (RP 198)

By Thanksgiving 2010, the parties were “miserable” together, and Kristoffer spent most of December 2010 in California. (RP 198, 514-15) Kristoffer returned to his hometown of Vancouver, B.C. in

January 2011, in part because after losing his job, he lost his legal status in the United States.<sup>1</sup> (RP 198, 505-06)

Chie filed a petition for dissolution on January 28, 2011. (See CP 224) Max, then nearly three years old, had lived with his father for less than a year. (RP 196-98) Melanie English, the parenting evaluator, testified that Chie is Max's primary attachment and care provider. (RP 276-78) Ms. English concluded that it would be detrimental for Max to be separated from Chie for any significant amount of time. (RP 348) The trial court agreed, finding that Chie has been the "primary parent" and that it would be more detrimental for Max to be away from Chie than it would be for him to be separated from Kristoffer. (Finding of Fact (FF) 2.3.1, CP 172; FF 2.3.3, CP 173)

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<sup>1</sup> The parties had previously discussed having Chie sponsor Kristoffer for a green card. (RP 503) But by early 2011 they had been living separately, and Chie was concerned about the stability of their relationship and the "long term commitment" involved in being a sponsor. (RP 763-64) Kristoffer testified that Chie avoided sponsoring him by claiming that their taxes first needed to be "fixed," because a green card sponsor must provide three years of tax returns and Chie had not declared foreign income from her employment in the United Kingdom early in their marriage. (RP 503-04) The trial court found that the green card issue and Chie's purported failure to report foreign income raised an "issue of credibility," but concluded that it was not "as germane" to the question whether to allow relocation. (FF 2.3.5, CP 175)

When Kristoffer first moved back to Vancouver, B.C., he suggested seeing Max every six to eight weeks; Chie “barely heard” from Kristoffer the first month after he moved. (RP 198-99) Eventually, Max began visiting Kristoffer in Canada once a month, and then on alternating weekends. (RP 199-200) Max and Kristoffer also “Skype” three times a week. (RP 78) These sessions were sometimes unsatisfying, because Max is still young. (RP 285) It was anticipated that the calls would improve “naturally as Max gets a little bit older.” (RP 285)

**B. The Mother, A Japanese-Born American Citizen, And The Father, A Canadian Citizen, Agreed That The Child Would Be Raised Bilingual And Multi-Cultural.**

Chie was born in Osaka, Japan. (RP 67, 91) Her entire family, including her mother, brother, cousins, aunts, and uncles, continue to reside in Japan. (RP 91, 94, 738-39) The parties discussed raising Max in Japan. (RP 768-69) Chie serves Max a largely Japanese diet. (RP 77, 207) Max is close with his grandmother and uncle in Japan, and has visited Japan nearly every year since he was born. (RP 97, 371-73, 738-39) Max is his maternal grandmother’s only grandchild. (RP 97)

The parties agreed that Max should be raised bilingual, with Kristoffer speaking English, and Chie speaking Japanese with him, to provide Max a “balanced upbringing.” (RP 84, 85, 511) After the parties separated, Max continued to speak primarily Japanese with Chie, although they have one “English day” per week to increase his time speaking English. (RP 84, 208)

Max was in Japanese immersion daycare between the ages of 1 and 3. (RP 86-87) At the time of the relocation trial, Max was enrolled in an English-speaking daycare, to further expose him to both parents’ cultures and to improve his English skills. (RP 86, 205) Chie testified that if Max were allowed to relocate to Japan, she would enroll him in an International Baccalaureate School, which is “a very well-known, academically very strong program.” (RP 771)

**C. Shortly After The Parties’ CR2A Parenting Agreement Designated Her The Primary Residential Parent, The Mother Learned That Her Mother Was Ill And Was Offered A Lucrative Position In Japan.**

The parties entered into a CR 2A Agreement for parenting on January 11, 2012. (Ex. 15; CP 46-60) At the time, Chie lived in Kirkland and Kristoffer lived in Vancouver, B.C. (See CP 25, 97-98) The agreement designated Chie as primary residential parent, with

residential time for Kristoffer and Max on alternating weekends in Vancouver. (Ex. 15; CP 49) While Max was in pre-school, he would reside with his father six days a month. (Ex. 15; CP 49) Once Max reached school age, his residential time with his father would reduce to four days a month. (Ex. 15; CP 49)

The month following execution of the CR2A Agreement, Chie learned that her mother had been diagnosed with late stage lung and colon cancer. (RP 94, 164-71, 710-11, 778-79; *see also* Ex. 35) In April 2012, Chie visited her mother, who was very sick and frail.<sup>2</sup> (RP 164-71) In May 2012, Chie's mother had surgery to remove part of her colon. (RP 168) Unfortunately, the cancer had spread, and not all of it could be removed. (RP 168) The grandmother was undergoing chemotherapy at the time of trial. (RP 168) Although

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<sup>2</sup> Chie had wanted to take Max with her to visit his grandmother on this trip, but Kristoffer refused. (RP 164) When Kristoffer continued to resist Chie's requests to take Max to Japan to visit, the parties participated in an arbitration with Howard Bartlett in May 2012 to determine whether Chie could take Max to visit his grandmother in June and August 2012. (RP 457, 460) Bartlett allowed the June visit but "stayed" a planned August visit pending the decision on relocation, noting that he did not think Chie had been "candid" about her intent to relocate. (RP 457-61, 791; CP 246; Ex. 124D, 124E)

When Chie returned to Japan in June 2012 with Max, his grandmother "lit up." (RP 173) Chie believed that Max gives the grandmother "life" during her illness. (RP 173)

the grandmother was responding “well” to the chemotherapy and Chie remained hopeful, her prognosis remained poor. (RP 779)

After learning of her mother’s diagnosis, Chie began considering the possibility of relocating to Japan, and started investigating employment opportunities. (RP 710-11) Chie had previously been contacted by Cisco about a job in Japan in November 2011. (RP 707, 711, 748) At the time, Chie was committed to staying in Washington and had not been interested in the position. (RP 707, 748-49) But once Chie learned of her mother’s illness, she reached out to Cisco.<sup>3</sup> (RP 95, 710-11, 748-49; *see also* Ex. 24, 25, 26, 27, 113) After receiving a positive response, Chie started interviewing with Cisco in March 2012 – approximately 7 weeks after signing the CR2A parenting agreement. (RP 436-37, 438-39)

The interviews went well, and Cisco indicated that it intended to present an offer to Chie. (RP 444; *See* Ex. 113) Chie

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<sup>3</sup> It was not unusual for recruiters to “court” Chie, due to her executive experience and skill set. (RP 702-03) Chie had been “tapped” for a position with Microsoft in Beijing, China in May 2011, while the dissolution was pending. (RP 244, 414, 415-17) Chie briefly considered the position, and had even offered to help Kristoffer find a job in China leveraging her contacts so that he could remain close to Max. (RP 414-19) But after Kristoffer declined and objected to the idea of Max and Chie moving to China, Chie decided not to pursue the position. (RP 415-19)

decided to wait to give notice of the possibility of relocating with Max to Japan until she was certain Cisco would make an offer. (RP 453-54) On May 20, 2012 – two months later – Cisco presented Chie with a written offer for the position of Head of Human Resources for Cisco, Japan, with annual compensation of \$320,000 to \$350,000. (RP 96, 453, 457, 742) Chie would have a team of 12 that reported to her, and she would report directly to the President of Cisco, Japan. (RP 96)

This would have been a significant promotion from Chie's position at Microsoft, where she was a Human Resources Manager for one business and earned approximately \$165,000. (RP 67; CP 107) At Microsoft, Chie has no direct reports, and is one in a team of thirty. (RP 68) The Cisco offer was made even more appealing when Chie learned in July 2012 that she had received the worst performance rating at Microsoft, and was on "thin ice."<sup>4</sup> (RP 69,

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<sup>4</sup> Chie received a poor performance review in part because she charged a change fee on a corporate credit card for an earlier flight home from a business trip to be with Max, which was considered a "personal expense." (RP 70-71) Chie had to use her corporate card because Kristoffer had garnished her accounts to obtain payment on a money judgment awarded to him as part of their property agreement, limiting Chie's access to her accounts. (RP 70-71, 666) Chie had also missed some "critical meetings," in part to accommodate transfers of Max to Kristoffer for his residential time. (RP 666, 712)

666) As a result of the poor performance review, Chie lost any merit increase in her salary and bonus opportunities. (RP 70; see Ex. 59) Chie expressed concern that she was professionally “over” at Microsoft, and possibly at other companies in the Pacific Northwest if word of her review got out. (RP 69, 746-47)

The trial court questioned Chie’s credibility because she did not provide the “actual review” at trial. (FF 2.3.5, CP 174) But the trial court apparently gave her testimony some credence, as it found that her “job [is] obviously a problem given her last poor review, there is a desirability [ ] for her obviously to look for a better job where she is not worrying about the poor review.” (FF 2.3.10, CP 176)

Chie accepted the Cisco job offer on May 29, 2012, and filed a Notice of Intended Relocation a week later, on June 5, 2012.<sup>5</sup> (RP 457, CP 35) The basis for Chie’s requested relocation was her mother’s illness and the Cisco job offer, both of which arose after the parties entered the CR2A parenting agreement. (CP 35-36; RP

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<sup>5</sup> Chie explained that she had not filed her notice earlier because Kristoffer’s counsel had been on a lengthy vacation and she understood that the “process” needed to be through his counsel. (RP 458-59; CP 225-26)

178) Chie also relied on the extensive family support available in Japan to assist her with Max's care. (CP 36)

Chie acknowledged Max's close relationship with Kristoffer and stated that she would ensure that Max "continues to see his father broadly the same amount of weeks as provided in our current parenting plan. Under my parenting plan Maximus will spend nearly all of his summer vacation with his father and part of his Winter Vacation. It is also anticipated that I will be returning to the West Coast of the US for business as Cisco has its headquarters in California, which could allow Maximus additional time with his father." (CP 36)

The parenting evaluator, Melanie English, testified that she believed Chie's request to relocate was in good faith in light of the grandmother's health issues and the job opportunity that she has been offered. (RP 283; *see also* Ex. 2 at 25: "The mother's reasons for relocating are based on a prestigious and advantageous job offer, to be near her family and her cultural heritage.") The trial court expressed concern that Chie's proposed relocation was a "long-planned and orchestrated move," and that the timing of the relocation gave it "pause." (FF 2.3.5, CP 174; CP 181) Nevertheless, the trial court recognized that "on the surface the mother is [seeking

to relocate with the child] for a better job, a step up on her ladder, she is a committed professional, and due to the serious illness of her mother.” (FF 2.35, CP 174)

Kristoffer objected to the relocation on June 27, 2012. (CP 1)

The parties’ final parenting plan based on their January 2012 CR2A Agreement was entered on June 29, 2012. (CP 73)

**D. The Child Made Allegations Of Abuse Against The Father, Later Determined To Be Unfounded. The Mother Did Not Rely On These Allegations In The Relocation Litigation.**

In January 2012, just prior to the parties entering into the CR2A Agreement, Chie reported to Deborah Gibbons, who had been providing therapy to both Chie and Max since March 2011, that Max had begun claiming that “daddy hits me on the head.” (RP 101-02, 113-14, 142, 725-26) Max had made the same claim to his nanny and others. (RP 141-42, 690) Chie told Ms. Gibbons that she did not know whether it was true, but Max had randomly made this statement enough times and continuously that she was becoming concerned. (RP 114-15, 694-96) In assessing Chie’s good faith in making the disclosure, the trial court expressed concern that Chie “waited” before disclosing the child’s allegations to Ms. Gibbons. (CP 180) But Chie testified that she feared that she might

be “overreacting” to Max’s comments. (RP 114-15, 694-95, 727)  
Chie sought guidance from Ms. Gibbons as to what she should do.  
(RP 114-15, 694-96)

Because she is a mandatory reporter, Ms. Gibbons believed she had “no choice” but to report the allegation to CPS, despite Chie’s concern that Kristoffer would believe (as he did) that Chie was seeking to alienate him from Max. (RP 114, 134) Ms. Gibbons assured Chie that CPS would investigate and determine whether Max’s claims were founded or unfounded. (RP 114)

Despite her concerns, Chie did not obstruct Kristoffer’s residential time with Max, and entered into a CR2A Agreement that allowed Max residential time with Kristoffer without limitation. (See Ex. 15) While Kristoffer complained that Chie did not provide him residential time with Max while she was traveling during this period (RP 533-34), it was not his scheduled residential time and the agreed parenting plan had no provision granting him a “first right” if Chie was out of town. (See Ex. 15; CP 46-60)

A few months after Chie’s disclosure, in May 2012, Ms. Gibbons independently saw a number of older bruises on Max’s leg during one of their sessions. (RP 120-22, 148-49) When Ms. Gibbons inquired, Max told her that “daddy hit me with a car.” (RP

121, 150) Max also told Ms. Gibbons that his father hit him in the stomach and head. (RP 151) Again, as a mandatory reporter, Ms. Gibbons reported the allegations to CPS. (RP 122)

Chie was conflicted about Ms. Gibbons' CPS reports. She wanted to protect Max, but was not certain the abuse claims were true, and feared retribution from Kristoffer. (RP 154-55, 694-95, 726-27) Chie was aware that the reports might "make me look like this person who might be making some random accusations against Kris." (RP 726-27) Chie "didn't want to believe that this was happening. I didn't want to think Kris was doing this." (RP 727) Chie deferred to Ms. Gibbons, who said that CPS should make the determination whether there was abuse. (RP 727-28) CPS eventually concluded that the allegations of abuse were unfounded. (RP 320, 529)

Chie filed her Notice of Intended Relocation while the CPS investigation was pending. (CP 35) She did not rely on the CPS investigation or the allegations of abuse as a basis for relocation. (See CP 35-45, 242-43, 245) Nevertheless, the trial court found that the "timing" of the abuse allegations was evidence of her bad faith in pursuing relocation. (FF 2.3.5, CP 174)

**E. The Trial Court Denied The Child's Relocation To Japan With His Mother Even Though The Child Must Move Because Both Parents Will Have Moved.**

On October 29, 2012, the parties appeared before King County Superior Court Judge Jean Reitschel for a four-day trial on Chie's request to relocate with Max to Japan. Despite finding that it would be more detrimental for Max to be separated from Chie than it would be for him to be separated from Kristoffer, the trial court denied Max's relocation to Japan. (CP 170-78) In making its decision, the trial court entered findings on each of the 10 factors of the Child Relocation Act. (CP 171-77) (Appendix A)

In its findings, the trial court focused on alleged detriments inherent in any relocation. For example, the trial court found that "Max needs regular contact with both parents at his young age [and] that it is a psychological detriment if he separated from either parent for more than four weeks," and that Max's relocation to Japan "would bring added change and limit his access to his father and that he needs predictability and routine." (FF 2.3.6, CP 175) The trial court also found that there was "concern that because

[Max] has already moved around so much he needs stability and peace.” (FF 2.3.6, CP 175)<sup>6</sup>

The trial court also expressed concern about the “conflict” between the parents, which it believed would increase if Max were allowed to relocate to Japan. (FF 2.3.6, CP 175) Specifically, the trial court questioned Chie’s “ability and desire to facilitate contact” between Max and Kristoffer if Max were to relocate to Japan. (FF 2.3.8, CP 176) As an example, the trial court pointed out that Chie had not offered residential time with Max to Kristoffer when she traveled to Japan for two weeks in April 2012. (FF 2.3.8, CP 176) Chie explained that this was around the time of the CPS investigation, and that she believed it was better to keep Max at home in Seattle with a trusted friend. (*See* RP 242, 513; *see also* CP 242) Prior to that trip, it was undisputed that Chie regularly offered Kristoffer additional time with Max when she traveled for business. (RP 242, 513, 580, 593, 596, 696-97)

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<sup>6</sup> It is not clear why the trial court believed that Max had “moved around so much.” The undisputed evidence was that Max had lived with Chie in Washington State since he was six months old, after moving from England to California with both parents when he was two months old. (*See* CP 3; RP 196, 708)

While expressing concern that Chie would not facilitate contact between Max and Kristoffer, the trial court ignored the evidence suggesting that Kristoffer would not facilitate contact if Max lived primarily with him in Canada. Kristoffer had already resisted Chie's efforts to take Max to visit his sick grandmother. (RP 164) At trial, he testified that Japan was the "child abduction capital of the world" (RP 541), and based on a "lot of stories on the Internet" claimed that "Japanese people, they go to Japan, they take their child, and then they decide to never return again." (RP 540) Kristoffer testified based on his "research" that "no child has ever been successfully litigated out of Japan once the mother decides not to [return]." (RP 542) Kristoffer relied on his internet "research" as a basis to deny relocation even though there was no evidence that Chie, who wanted to move to Japan to take a high profile job with an American-based company, had ever threatened to "abduct" or to cut off contact between Max and his father, and the parenting evaluator testified that Chie was not a "flight risk." (RP 302)

Finally, the trial court concluded that relocation was not warranted because the mother's request was in bad faith. The trial court found "that the actual illness of her mother was an intervening event that would be a good-faith motive for relocation

and that did have an impact on the mother's reasons" (CP 181), and acknowledged the sound reasons for Chie's desire to relocate – her ill mother and the "better job" – but found the "timing" of her request was evidence of bad faith. (FF 2.3.5, CP 174) Based on its finding that her requested relocation was in bad faith, the trial court awarded the father \$17,263.86 - half of the attorney fees that he had incurred responding to the requested relocation. (CP 179-81)

The mother appeals. (CP 296)

## V. ARGUMENT

### A. **The Trial Court Failed To Properly Apply The Presumption That A Move With The Primary Parent Should Be Allowed, Subverting The Statutory Presumption That The Mother Will Move Even If The Child's Relocation Is Denied.**

Unless the mother foregoes her own relocation – a possibility RCW 26.09.530 expressly forbids the trial court from considering – the child will move to Vancouver, B.C. if restrained from relocating with his mother. The question for the trial court was whether the child should move with his mother, whose decision-making is given deference under the Child Relocation Act, or relocate to live with his father, with whom the child has never primarily resided. In other words, the issue is not just whether the child should be allowed to relocate (because relocation is inevitable), but whether the child's

custodial continuity with his primary residential parent should be disrupted and primary care transferred to the other parent. The answer, compelled by both the Child Relocation Act and the Parenting Act, is that the trial court should have allowed the child to relocate with his mother, his primary residential parent.

The Child Relocation Act gives the trial court authority to restrain the *child*, not a parent, from relocating. RCW 26.09.420; *See Momb v. Ragone*, 132 Wn. App. 70, 82, ¶¶ 31, 33, 130 P.3d 406 (2006) (Child Relocation Act recognizes that parents have a fundamental right to relocate, but that children’s constitutional rights can be tempered because of their “peculiar vulnerability” and “the importance of the parental role in child rearing”), *rev. denied*, 158 Wn.2d 1021. Because the trial court may only restrain the child from relocating, the trial court must base its decision on a presumption that the consequence of denying relocation will be that the child will remain in his current location with the objecting parent. RCW 26.09.520; RCW 26.09.530 (prohibiting consideration “of whether the person seeking to relocate the child will forego his or her own relocation if the child’s relocation is not permitted”). Here, the father had long ago left the jurisdiction, and any order restraining the child from relocating with his mother

would effectively strand the child in a geographic region where neither parent resides. Thus, the true motivation behind the trial court's decision – the improper intent to foreclose *the mother's* relocation – becomes apparent.

The trial court's order subverts the statutory presumption that the child will be allowed to relocate with his primary residential parent, which is intended to "give substantial weight to the traditional presumption that a fit parent will act in the best interests of her child." *Custody of Osborne*, 119 Wn. App. 133, 144, 79 P.3d 465 (2003); RCW 26.09.520. In other words, deference is given to the primary residential parent's decision that relocation is in the family's best interests. *Marriage of Horner*, 151 Wn.2d 884, 887, 93 P.3d 124 (2004) (the Child Relocation Act "shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person").<sup>7</sup> The presumption also is consistent with our state's policy against parenting plan modifications changing the child's primary caregiver, which is considered "highly disruptive" to the child. *See*

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<sup>7</sup> In recommending against relocation, the parenting evaluator acknowledged that she disregarded the statutory presumption under the Relocation Act, and made her determination based solely on the "best interests of the child." (RP 332-33) The trial court does not have that option.

*Marriage of Taddeo-Smith & Smith*, 127 Wn. App. 400, 404, ¶ 6, 110 P.3d 1192 (2005) (“Custodial changes are viewed as highly disruptive to children, and there is a strong presumption in favor of custodial continuity and against modification.”); *see also* RCW 26.09.260. Again, the trial court’s willingness to compel a move to the father’s home absent grounds for modification reveals its improper intent to prevent *the mother’s* relocation.

The father acknowledged that there was no basis to modify the parenting plan other than mother’s requested relocation. (*See* CP 210: “I would not have filed a petition to modify if the mother had not served me with a notice of intent to relocate.”) When the consequence of its decision is that the child is left in a location where neither parent lives, the trial court erred in denying the child’s relocation in the absence of independent grounds for changing the child’s primary parent. Once the trial court found that it would be more disruptive for the child to be separated from his mother than the father, the trial court should have granted the child’s relocation to Japan. This court should reverse and allow the child’s relocation with his mother because the child will in any event be required to relocate, and there was no basis warranting a change in the child’s primary caregiver.

**B. The Trial Court Failed To Properly Weigh The Relocation Factors.**

Because of the “rebuttable presumption that the intended relocation of the child will be permitted,” the Child Relocation Act “requires proof that the decision of a presumptively fit parent to relocate with the child (thereby interfering with residential time of a parent or a third party that a court has previously determined to serve the best interest of the child) will in fact be so harmful to a child as to outweigh the presumed benefits of relocation to the child and the relocating parent.” *Parentage of R.F.R.*, 122 Wn. App. 324, 332-33, 93 P.3d 951 (2004). The objecting party must prove “that the detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person” based on the ten factors set forth in RCW 26.09.520.

While the trial court purported to address each of the RCW 26.09.520 factors, clearly underlying the trial court’s decision was an improper assumption that the mother would forego her own move if the child was not allowed to relocate, contrary to RCW 26.09.530’s express prohibition of consideration “of whether the person seeking to relocate the child will forego his or her own relocation if the child's relocation is not permitted or whether the

person opposing relocation will also relocate if the child's relocation is permitted.” The trial court in this case improperly applied the Child Relocation Act factors, concluding the child’s relocation should be denied based largely on “detriments” that are inherent in any relocation:

**1. The Trial Court’s Findings Favor Relocation, Because It Would Be More Disruptive For The Child To Be Separated From His Mother.**

Even if the Act required the trial court to simply count whether there are more minuses than pluses to relocation, the father failed to meet his heavy burden of demonstrating that the “detrimental effect of the relocation outweighs the benefit of the change to the child and the relocating person.” RCW 26.09.520. Of the ten statutory factors, the trial court found six factors “even” or inapplicable, one factor in favor of relocation, and three factors against relocation. (CP 171-77) (Appendix A) In light of the presumption in favor of relocation, any factor that was not found to be *against* relocation should be considered a factor in *favor* of relocation. And because the child’s move with one parent is inevitable, and it would be more detrimental for the child to be separated from the mother, the trial court’s findings in fact support

relocation given this family's circumstances. RCW 26.09.520(3) (FF 2.3.3, CP 173)

The trial court found that the child has a "deep and close relationship with both of his parents." RCW 26.09.520(1) (FF 2.3.1, CP 172) But the child's "deep and close relationship" with his father does not justify prohibiting his relocation with his mother, who the trial court recognized was the "primary parent" with whom the child also has a "deep and close relationship." (FF 2.3.1, CP 172)

The trial court also acknowledged that the mother's "reasons" for relocating were sound. RCW 26.09.520(5) (FF 2.3.5, CP 174) The trial court found that "on the surface, the mother is moving for a better job, a step up on her ladder, she is a committed professional, and due to the serious illness of her mother." (FF 2.3.5, CP 174) Regardless that the trial court found the timing of the mother's requested relocation – after the CR2A Agreement was signed but before the final parenting plan was entered – was sufficient to give it "pause," the trial court acknowledged that "the actual illness of her mother was an intervening event that would be a good faith motive for relocation." (CP 181)

As Chie testified, she had no "crystal ball" to know that after she signed the CR2A Agreement she would learn that her mother

was seriously ill or that she would be offered a lucrative position with Cisco, Japan. (RP 453-54, 711) While the trial court questioned when Chie started pursuing employment with Cisco, all of the tangible evidence showed that the mother did not start actively interviewing with Cisco until she learned of her mother's diagnosis (see Ex. 24, 25, 26, 27, 113), and there was no dispute that her mother's diagnosis did not occur until after the CR2A Agreement was signed. (See RP 711; Ex. 35) The parenting evaluator, tasked with investigating the requested relocation found the mother's request was in good faith due to both her mother's illness and the career opportunity being offered to her. (RP 283)

The trial court recognized that the mother's job opportunity in Japan would provide her and her family with a "significantly greater salary" than her current job at Microsoft, where she had recently been given a "poor" performance review. RCW 26.09.520(10) (FF 2.3.10, CP 176) This finding favors relocation because our courts have historically permitted relocation when the resulting benefit was employment opportunity and financial stability for the family.

"Regular employment at good pay" is a most significant consideration in terms of the welfare and the best interests of the

minor child. *Marriage of Nedrow*, 48 Wn.2d 243, 249-50, 292 P.2d 872 (1956) (permitting relocation to Illinois when step-father offered job in Chicago); *see also Marriage of Fahey*, 164 Wn. App. 42, 262 P.3d 128, 131 (2011), *rev. denied*, 173 Wn.2d 1019, 272 P.3d 850 (2012) (permitting relocation from Edmonds to Omak for the mother's new job); *Marriage of Pape*, 139 Wn.2d 694, 989 P.2d 1120 (1999) (permitting relocation to Clark County from Pierce County to allow mother to secure teaching position). As the *Pape* Court noted:

Children of divorce do better when the well-being of the primary residential parent is high. Primary residential parents who are experiencing psychological, emotional, social, economic, or health difficulties may transfer these difficulties to their children and are often less able to parent effectively.

*Pape*, 139 Wn.2d at 709, quoting Diane N. Lye, *Washington State Parenting Act Study: Report to the Washington State Gender and Justice Commission and Domestic Relations Commission* 4-10 (1999). By focusing entirely on what it perceived was the mother's purported bad faith in pursuing relocation because of the "timing" of her request, the trial court failed to give any weight to the "reasons" for the relocation as required by the Act. *See* RCW 26.09.520(5) ("the reasons of each person seeking or opposing the

relocation and the good faith of each of the parties in requesting or opposing the relocation”).

Also in support of relocation was the trial court’s finding that Japan (as well as Seattle and Vancouver) “would provide a good quality of life, resources, and opportunities to both the child and the parents.” RCW 26.09.520(7) (FF 2.3.7, CP 175) Rather than concluding that this finding did not weigh for or against relocation, the trial court should have found that this factor favors relocation. In fact, Japan offered the family not just greater financial support, but also familial support from the mother’s extended family. Rather than relying on paid daycare providers, family members could provide care for the child if the child were allowed to relocate to Japan. (*See* CP 36)

Because the relocation would provide economic benefits and allow the family to be close to the ailing grandmother and all other extended family members of the mother, and because Japan would provide a good quality of life and opportunities to the family, the trial court should have allowed the child to move.

**2. The Trial Court's "Negative" Findings Identified Only Detriments Inherent In Any Move.**

The trial court's findings against relocation focus almost exclusively on the trial court's concerns with any change to the status quo. But "[p]arenting and family life will not be the same" after divorce, and the "trial court does not have the responsibility or the authority or the ability to create ideal circumstances for the family." *Marriage of Littlefield*, 133 Wn.2d 39, 57, 940 P.2d 1362 (1997). The "detriments" identified by the trial court would be present regardless whether the child is allowed to relocate with the mother or was moved to his father's primary care, and reflect the trial court's erroneous intent to maintain the status quo by forcing the mother to forgo her own move.

The trial court found that the child needs "regular contact with both parents;" "it is a psychological detriment if he separated from either parent for more than four weeks;" and "separation of time between visits not being recommended for a child at this age." RCW 26.09.520(6) (FF 2.3.6, CP 175); RCW 26.09.520(8) (FF 2.3.8, CP 176) But the trial court was required to presume that the mother would relocate regardless of whether the child was restrained. RCW 26.09.530. Whether the child is allowed to

relocate or not, he will lose “regular” contact with one of his parents.

The trial court also found that the relocation “would bring added change and limit his access to his father.” RCW 26.09.520(6) (FF 2.3.6, CP 175) But a parent attempting to prevent the relocation has the burden of demonstrating a “specific detriment” to the child not inherent in the geographical distance between the parents. *See Marriage of Sheley*, 78 Wn. App. 494, 495-96, 895 P.2d 850 (1995), *overruled on other grounds by Marriage of Littlefield* 133 Wn.2d 39, 940 P.2d 1362 (1997) (geographic restrictions in a parenting plan may not be imposed “absent a showing of a specific detriment to the child if the child is relocated”). Here, the father failed to show any specific detriment to the relocation beyond the fact that the residential time that he had under the current parenting plan will necessarily be changed.

As the *Sheley* court acknowledged, “all change is disruptive, and a simple balancing of the status quo against the unknowns of the new location, particularly in light of the disruption already attendant to the separation and divorce, is likely to result in the undue sacrifice of the constitutional right to travel, often to the detriment of women, many of whom are financially devastated by

divorce and, more often than men, in need of the opportunity to make a new economic start.” 78 Wn. App. at 504.

While the trial court (and the father) in this case might have preferred the status quo, the “trial court does not have the responsibility or the authority or the ability to create ideal circumstances for the family.” *Littlefield*, 133 Wn.2d. at 57. The trial court found that because the child “has already moved around so much that he needs stability and peace.” (FF 2.3.6, CP 175) This finding simply is not supported by the evidence, as the child has lived in Washington State consistently since he was six months old. (See CP 3) And this finding ignores that by restraining the child’s relocation to Japan, the trial court necessarily ordered the child to relocate to Vancouver.

The trial court also expressed concerns about “the [mother]’s ability and desire to facilitate contact” between the father and child. RCW 26.09.520(8) (FF 2.3.8, CP 176) But the mother proposed a residential schedule that provided liberal residential time for the child and father in Canada. (See CP 36, 38-45) Given the trial court’s findings of the “deep and close relationship” between the child and father, it is more likely that the father’s relationship with

the child will remain strong with this expansive parenting plan relative to the distance between homes.

Further, while the trial court expressed concern about the mother, it was the father's testimony that suggested he was not likely to facilitate access to the mother if the child was in the father's primary care and the mother moved to Japan. As noted in the Statement of Facts, as a basis for denying relocation, the father presented the bogeyman of "Japanese people" who abscond with their children once allowed to travel to Japan. (See Statement of Facts § E) *See Katare v. Katare*, 175 Wn.2d 23, 44, ¶ 39, 283 P.3d 546 (2012), *cert. denied*, 133 S.Ct. 889 (U.S. 2013) (J. Chambers, concurring) ("Our courts should not admit evidence based on racial profiling, and we judges absolutely should not make our decisions based on racial animus. Theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial.") The father's unwarranted "extreme concern" about the mother traveling to Japan with the child suggests he would not have the "ability and desire to facilitate" contact with the mother if the child was transferred to his primary care. (See RP 542)

The trial court also found “it is not reasonable for [the father] to relocate to Japan.” RCW 26.09.520(9) (FF 2.3.9, CP 176) But the father testified that there is a “possibility” he could relocate - he just did not have the “desire” to do so. (RP 560) In considering this factor the trial court was also required to consider whether there were any “alternatives to relocation” for the mother as well. RCW 26.09.520(9) (“the alternatives to relocation and whether it is feasible and desirable for the other party to relocate also”). The job offer from Cisco was for far more money than she was making at Microsoft, where she had recently gotten the worst review in the company, and the grandmother could not relocate to the United States. The alternative for the mother to forego relocation was no better than for the father to relocate. To the extent that this made the parties “even,” because of the presumption that relocation should be allowed this factor favored relocation.

The trial court also found that because transportation costs between Japan and Canada were “high,” and the cost of living in Japan is “somewhat greater,” this weighed against relocation. RCW 26.09.520(10) (FF 2.3.10, CP 176) But transportation costs will be incurred regardless whether the child is restrained from relocating to Japan, because the child would then relocate to Canada. Even if

travel costs were greater, the mother's income would have been significantly larger than that of the father, and she would bear the greater financial burden. RCW 26.19.080(3) (parents share the cost of long-distance transportation expenses in proportion to their incomes). And in light of the mother's "significantly greater salary" in Japan, (FF 2.3.10, CP 176), any potential cost of living increase would be negligible.

The trial court focused on detriments to relocation that are inherent in any move. In doing so the trial court improperly ignored the underlying intent of the statute, which is to allow relocation unless it can be proven that the relocation will "be so harmful to a child as to outweigh the presumed benefits of relocation to the child and the relocating parent," *Parentage of R.F.R.*, 122 Wn. App. at 332-33, and revealed its true intent to force the mother to forgo her own move.

**3. The Timing Of The Mother's Notice Was Not A Basis To Prohibit The Child's Relocation When Her Reasons For Moving Were Valid.**

There was no dispute that the mother did not learn of the grandmother's diagnosis until after the CR2A Agreement, and that this was the trigger for her desire to relocate. (RP 94, 164-71, 710-11, 778-79) Even the trial court acknowledged that the "actual

illness of her mother was an intervening event that would be a good-faith motive for relocation.” (CP 181) The trial court nevertheless found the mother to be in bad faith for pursuing a relocation after agreeing to a parenting plan that presumed she would remain in Washington – not because it found that her reasons for relocating were not valid, but because the “timing” of her request gave the trial court “pause.” (FF 2.3.5, CP 174-75)

First, the parties’ agreements are only a factor to be considered in assessing relocation – not evidence of bad faith. Second, the Parenting Act recognizes that events occurring after parenting agreements may require changes to the parenting plan. RCW 26.09.260(1) authorizes modification of a parenting plan based upon “facts that have arisen since the prior decree or plan.” The “facts that have arisen” since the parties’ CR2A Agreement in this case were the grandmother’s illness and the job offer, which would provide the family with significantly greater income.

The trial court also found that because the mother had previously agreed that it was not in the child’s best interest to move to China in June 2011, her requested relocation one year later to Japan was in bad faith. (FF 2.3.5, CP 174) But whether the mother believed relocation to China was in the child’s best interests is

wholly irrelevant to the mother's decision a year later to relocate to Japan – where all of her family, including her ailing mother, reside, and where she had secured employment that would provide her with what the trial court acknowledged was “a better job [and] a step up on her ladder.” (FF 2.3.5, CP 174)

The trial court also questioned when the mother applied to Cisco before the CR2A Agreement or after. But the mother testified that she was originally pursued by Cisco in November 2011 – before she learned of the grandmother's diagnosis – and had not then been interested in relocating. (RP 707, 711, 748) It was only *after* the mother learned of the grandmother's diagnosis that she began actively interviewing with Cisco in March 2012, and was offered and accepted the position in May 2012. (RP 95, 710-11, 748-49; *see also* Ex. 24, 25, 26, 27, 113)

Finally, the trial court relied on the “timing” of the therapist's CPS reports to find that the mother did not act in good faith in pursuing her relocation. (FF 2.3.5, CP 174) But the mother never relied on these reports to support her relocation. (*See* CP 35-37) Instead, she based her requested relocation solely on the grandmother's illness, the job opportunity with Cisco, and the

support of her extended family, who all live in Japan. (See CP 35-37)

A parent seeking to relocate to another country should have a “well thought out plan.” (FF 2.3.5, CP 175) That the mother “planned” her relocation by pursuing employment opportunities where she sought to move should have been considered a positive, not a negative. There can be no dispute that the mother had valid reasons for her requested relocation. These reasons, coupled with the trial court’s finding that it would be more disruptive for the child to be separated from his mother and the child’s inevitable move either with his mother or to his father’s home, warranted an order allowing the child’s relocation with his mother.

**C. The Trial Court’s Findings Do Not Support Its Award Of Fees To The Father.**

The trial court erred in awarding attorney fees to the father under RCW 26.09.550, for the mother’s purported bad faith in pursuing relocation, and based on her alleged intransigence. The trial court’s findings do not support an award of half the attorney fees incurred by the father under either basis.

RCW 26.09.550 allows the trial court to “sanction” a party if relocation was sought to “harass a person,” “to interfere in bad faith

with the relationship” between the child and the other parent, or to “unnecessarily delay or needlessly increase the cost of litigation.” A court may also award attorney fees for “intransigence” that causes the other party to incur additional legal fees. *Marriage of Bobbitt*, 135 Wn. App. 8, 30, 144 P.3d 306 (2006), *appeal after remand*, 149 Wn. App. 1055 (2009). An award for intransigence must be supported by findings and is limited to the additional fees caused by the improper conduct. *Bobbitt*, 135 Wn. App. at 30; *see Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998); *Marriage of Crosetto*, 82 Wn. App. 545, 565, 918 P.2d 954 (1996), *appeal after remand*, 101 Wn. App. 89, 1 P.3d 1180 (2000).

Here, the trial court made no findings that support an award of fees. The trial court relied on the arbitrator’s speculation that the mother might not have been “candid” about her desire to relocate during the visitation arbitration, and that the mother had already been contemplating relocation when she negotiated the final parenting plan. (FF 2.3.5, CP 174; CP 180) But even if these findings were supported by the evidence, the fact that the mother may have “planned the relocation” does not support an award of attorney fees absent a finding she pursued relocation to “harass” the other parent or to interfere in bad faith with the other parent’s

relationship with the child, or that the request was made to increase the other party's attorney fees.

The trial court's finding that the mother allowed a babysitter to care for the child while she traveled is not a basis to award attorney fees under RCW 26.09.550. (CP 181) Keeping the child in the Seattle area while she traveled was a decision the mother was entitled to make under the parenting plan, as it related to the child's "day to day care" during her residential time and there is no "right of first refusal" in the parenting plan requiring the mother to offer the father the opportunity to have residential time if she is travelling. (CP 80: "Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent")

There was also no basis for the trial court to award attorney fees because of the CPS reports that were later determined to be unfounded. (CP 180) Although the trial court found that the "timing of those reports coincided with important parts of these actions," the mother did not rely on these reports as a basis for her requested relocation. (CP 180) Neither the mother's notice of intended relocation nor her proposed parenting plan even mention the then pending CPS reports. Because the mother did not make

the CPS reports part of the relocation litigation, there was no evidence that the father incurred any additional attorney fees to address them. *See Marriage of Burrill*, 113 Wn. App. 863, 56 P.3d 993 (2002) (affirming an award of attorney fees based on intransigence when the trial court specifically found that the mother's allegations caused the father to incur unnecessary and significant attorney fees and the record demonstrated that the allegations permeated the entire proceedings), *rev. denied*, 149 Wn.2d 1007, 67 P.3d 1096 (2003).

Finally, to the extent there was "non-compliance with discovery requests," (CP 181) this was not a basis to award half the attorney fees incurred by the father. Any attorney fees awarded "must be limited to the additional fees caused by the improper conduct." *Bobbitt*, 135 Wn. App. at 30. The father did not segregate his fees related to any discovery issues and neither the evidence nor the trial court's findings support any award for discovery violations.

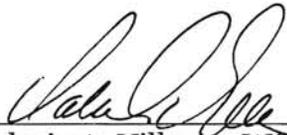
The trial court's findings do not support an award of half of the fees incurred by the father in objecting to the relocation under either RCW 26.09.550 or for intransigence. This court should vacate the fee award.

## VI. CONCLUSION

The father did not meet his burden of demonstrating that the benefits of the relocation to the child and the relocating parent are outweighed by its detriments. The detriments relied upon by the court are inherent in any move. This court should reverse the order prohibiting relocation and vacate the award of attorney fees to the father.

Dated this 18th day of July, 2013.

SMITH GOODFRIEND, P.S.

By:   
Valerie A. Villacin, WSBA No. 34515  
Catherine W. Smith, WSBA No. 9542

Attorneys for Appellant

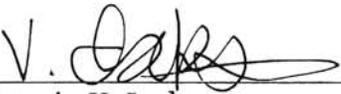
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on July 18, 2013, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Kristilyn Reese Sakaguchi & Reese, PLLC 1120 NE 2nd Street, Suite 201 Bellevue, WA 98004	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Virginia M. Onu Virginia M. Onu, Inc., P.S. 11033 NE 24th Street Suite 200 Bellevue, WA 98004	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Kenneth W. Masters Shelby R. Frost Lemmel Masters Law Group PLLC 241 Madison Ave N Bainbridge Island, WA 98110-1811	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 18th day of July, 2013.

  
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Victoria K. Isaksen

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Superior Court of Washington  
County of KING COUNTY

In re the Marriage of:

CHIE KAWABATA

and

KRISTOFFER G. MORNESS

Petitioner,

Respondent.

No. 11-3-00982-7 SEA

Order on Objection to  
Relocation/Modification of  
Custody Decree/Parenting  
Plan/Residential Schedule  
(Relocation)  
(ORDYMT or ORGRRE)

I. Basis

This order is entered pursuant to:

A trial on the Objection to Relocation/Petition for Modification of Custody  
Decree/Parenting Plan/Residential Schedule held on October 29, 30 and 31 and  
November 1 of 2012.

II. Findings

*The Court finds:*

**2.1 Adequate Cause**

The relocation of children was pursued. There was no need for adequate cause for  
hearing this petition for modification.

**2.2 Jurisdiction**

Ord re Obj to Reloc/Mod P Plan/Res Schd.(ORDYMT or ORGRRE) - Page 1 of 9  
WPF DRPSCU-07.0900 Mandatory (6/2008) - RCW 26.09.520, .260(6),  
26.10.190, 26.26.160

Virginia M Onu Inc PS  
11033 NE 24th St. Suite 200  
Bellevue, WA 98004

1 This court has jurisdiction over this proceeding for the reasons below:

2 This court has exclusive continuing jurisdiction. The court has previously made  
3 a child custody, parenting plan, residential schedule or visitation determination in  
4 this matter and retains jurisdiction under RCW 26.27.211.

5 This state is the home state of the child because:

6 the child lived in Washington with a parent or a person acting as a parent  
7 for at least six consecutive months immediately preceding the  
8 commencement of this proceeding.

9 any absences from Washington have been only temporary.

### 10 2.3 Findings Regarding Objection to the Relocation

11 Based upon the following factors, the detrimental effects of allowing the child to move  
12 with the relocating person do outweigh the benefits of the move to the child and the  
13 relocating person:

14 The court starts with RCW 26.09.520. The court is to consider and weigh the ten listed  
15 factors. The eleventh factor does not apply as this is the permanent hearing.

16 The objecting person must show by a preponderance of the evidence that the  
17 detrimental effect of relocating outweigh the benefits. The parent with whom the child  
18 resides the majority of the time is entitled to a presumption in favor of relocation, but the  
19 presumption is rebuttable.

20 The court is going to go through each factor and state the evidence and the court's  
21 conclusion as to whether that factor weighs in favor or not of relocation.

22 2.3.1 The relative strength, nature, quality, extent of involvement, and stability of the  
23 child's relationship with each parent and other significant persons in the child's  
24 life.

25 Does apply as follows:

The first factor is the relative strength, nature, quality, extent of involvement,  
stability of the child's relationship with each parent, siblings and other significant  
persons in the child's life and I will start with the report of Dr. English.

The court finds that her report was thorough, she was very balanced, she was  
measured of the criticism either parent made of each other, and she tended to  
see strengths in both the parents.

Her testimony was that there were different and close bonds with each parent.  
The child primarily resides with the mother and has regular contact with the

1 father. She in fact had recommended three weekends, given the geographical  
2 situation, per month and the parties had settled on two weekends with the father.  
3 She found that the mother had the role of the primary parent but that both  
4 parents had the capacity to parent, that both parents loved Max, and that Max  
5 gets different things from each of his parents and that he adjusted well to his time  
6 in Canada. She saw the father as being playful, interactive and close with his  
7 son. The mother testified that she had controlled many things that were  
8 necessary for Max's development, including schedules, school, she also cooked  
9 for him, took him to swimming lessons, she had two witnesses who testified she  
10 was a wonderful mother.

11 The father testified that he had cared for Max since birth, that his absence was  
12 due to the mother's job choice, that he moved to Seattle when he was able to,  
13 that in Canada when Max visits they play with the dog, they have many visits with  
14 the extended family, he likes to throw Frisbees with his son and read to him and  
15 that he arranged daycare for Mondays.

16 The court heard the testimony of Ms. Gibbons. She testified that the mother  
17 was her client although she saw the child eight times and the father twice. She  
18 saw herself as an advocate for the mother. In Dr. English's testimony she stated  
19 that Ms. Gibbons' interview with Max did not comply with best practices. There  
20 were certainly reasons for concerns with that interview, given that the mother  
21 was in the room, the bruises did not appear to be fresh, for the last referral to  
22 CPS the child had actually not seen the father recently, and she appeared to step  
23 outside her role in making parenting evaluation comments.

24 The court does not find Ms. Gibbons' testimony particularly helpful.

25 The court concludes from all the evidence that Max has a deep and close  
relationship with both of his parents, that the mother has filled the role of the  
primary parent.

In this factor the court must consider also his contacts and relationship with  
significant others. When Max is with his mother he has significant contact with  
the nanny, although that contact has lessened a little bit of late. He has contact  
with his maternal grandmother who is facing a potential terminal illness, perhaps  
six months to a year, which is a serious concern for petitioner, is undergoing  
chemotherapy at present. Max has visited her in Japan and maintained contact  
with her.

On the father's side, when Max is with him, the court heard the testimony of Ms.  
Caldwell, Mrs. Morness and Mrs. Caldwell. The Canadian family has welcomed  
and folded Max into their extended family. He has regular contact with his  
cousins, regular visits with his paternal grandmother, and regular visits with his  
fiancee's mother. There was testimony that Max pounds on the door, runs in,  
gets a hug, and goes to muck about in the garden, to the park and to a special  
restaurant he shares with the grandmother.

1 From all of the testimony in looking at the strength of his relationship with his  
2 parents, the relationship with other significant persons in his life the court would  
3 conclude that this factor is even, and it doesn't weigh in favor or opposed to  
4 relocation.

5 2.3.2 Prior agreements of the parties.

6 Does not apply.

7 The next factor is prior agreements of the parties. There hasn't been an  
8 agreement as to relocation. The court does look at the history of this case.  
9 There was a CR2A signed on January 11<sup>th</sup>, 2012, there was a Notice of Intent to  
10 Relocate on June 5, 2012, there was a parenting plan entered on June 29, 2012,  
11 and a dissolution decree entered on July 5, 2012. This raises a concern but the  
12 court believes it is properly addressed in another factor, the court will find that  
13 this factor does not strictly apply.

14 2.3.3 Disrupting contact between the child and the objecting party or parent is more  
15 detrimental to the child than disrupting contact between the child and the person  
16 with whom the child resides a majority of the time.

17 Does apply as follows:

18 The third factor is whether disrupting the contact between the child and the  
19 person with whom the child resides the majority of the time would be more  
20 detrimental to the child than disrupting the contact between the child and the  
21 person objecting to the relocation.

22 In this factor the court is primarily relying on Dr. English's conclusion that it would  
23 be more detrimental for Max to be away from the mother since she has been the  
24 primary parent. She also had concerns that there would be detriment to be  
25 away from the father as well. If the parties had lived in the same location when  
she was the parenting evaluator she would have recommended shared  
residential time.

The court would conclude that this factor weighs in favor of relocation.

2.3.4a The objecting party or parent is subject to limitations under RCW 26.09.191.

Does not apply.

2.3.4b The following parents or persons entitled to residential time with the child are  
subject to limitations under RCW 26.09.191.

Does not apply.

1  
2 The fourth factor is whether either parent is subject to limitations under RCW  
26.09.191. The court would find this does not apply since there are no  
3 restrictions.

4 2.3.5 The reasons and good faith of each person seeking the relocation.

5 Does apply as follows:

6 The fifth factor is the reason of each person for seeking or opposing the  
7 relocation and the good faith of each of the parties in requesting or opposing the  
8 relocation.

9 This factor is actually quite complex in this case. On the surface the mother is  
10 moving for a better job, a step up on her ladder, she is a committed professional,  
11 and due to the serious illness of her mother. Dr. English believes this move is in  
12 good faith.

13 The father opposes it due to the impact it would have on his residential time and  
14 Dr. English also believes that his opposition is in good faith.

15 But the court has to look at the issue a little deeper here. There are a number of  
16 issues regarding the timing of this relocation petition that give the court pause.

17 The first issue with timing is its filing after the CR2A was agreed, before the final  
18 parenting plan was entered.

19 The second issue is that just in June of 2011 the mother agreed that it was not in  
20 Max's best interest to move to China.

21 The third issue is when in fact she applied for the new job, whether it was in  
22 November of 2011 or April of 2012 and receiving the offer in May 2012 and the  
23 evidence is not conclusive on that.

24 The fourth issue in timing is the allegation of child abuse after two previous  
25 allegations of child abuse reported to CPS were both unfounded.

And there are issues regarding her credibility.

There is the arbitrator's conclusion that the relocation proposal  
26 appears well thought out and planned for some time and it raises a  
27 concern regarding candidness with the arbitrator in that she had stated  
28 she was committed to a job at Microsoft.

The petitioner claims her new job is due to her last performance  
29 review at Microsoft but she has not provided the actual review. There is  
30 various explanations of credit card use, the garnishment which was  
31 limited to one account and one paycheck, her duties under the parenting  
32 plan. She has not substantiated if any of those did in fact play a role and  
33 she obviously has control of this document and could have provided it if  
34 she chose.

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2 Other issues of credibility arose in terms of the green card issue, the tax  
3 return, the failure to report foreign income, the admission of incorrect  
4 names on taxes, the admission of the mistake on the financial statement,  
5 but these issues are not as germane.

6 But looking at all the evidence, the court concludes that the petitioner has not  
7 acted in good faith, that this was in fact a well thought out plan, and finds that this  
8 factor weighs against relocation.

9 2.3.6 The age, developmental stage, and needs of the child, and the likely impact the  
10 relocation or its prevention will have on the child's physical, educational, and  
11 emotional development, taking into consideration any special needs of the child.

12 Does apply as follows:

13 The sixth factor is the age, developmental stage, and needs of the child, and the  
14 likely impact the relocation or its prevention will have on the child's physical,  
15 educational, and emotional development, taking into consideration any special  
16 needs.

17 The court will rely primarily on Dr. English's testimony that relocation is not in  
18 Max's best interest. Dr. English testified that Max needs regular contact with  
19 both parents at his young age, that it is a psychological detriment if he separated  
20 from either parent for more than four weeks. There was a concern that because  
21 he has already moved around so much that he needs stability and peace. The  
22 relocation would bring added change and limit his access to his father and that  
23 he needs predictability and routine. She also testified that less frequent contact  
24 would add to the already excessive conflict between his parents and that he has  
25 spent most of his life in litigation.

This factor weighs against relocation.

2.3.7 The quality of life, resources, and opportunities available to the child and to the  
relocating party in the current and proposed geographic locations.

Does apply as follows:

The seventh factor is the quality of life, resources, and opportunities available to  
the child and to the relocating party in the current and proposed geographic  
locations.

In terms of Seattle, Vancouver, Osaka, Tokyo the court finds that all locations  
would provide a good quality of life, resources and opportunities to both the child  
and the parents and that this factor is even.

2.3.8 The availability of alternative arrangements to foster and continue the child's  
relationship with and access to the other parent.

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Does apply as follows:

The eight factor is the availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

The testimony established that Skype has not worked well at present, even with regular visits to the father. Dr. English testified that there aren't other creative ideas that would work due to the child's young age.

The court is concerned regarding petitioner's ability and desire to facilitate contact given the testimony that she left her child with a third party who had not previously babysat for Max when she went on an extended trip to Japan, rather than having the child go to his father.

The other testimony regarding the increased conflict, separation of time between visits being not recommended for a child this age, the court concludes that this factor weighs against relocation.

2.3.9 Alternatives to relocation and whether it is feasible and desirable for the other party to relocate.

Does apply as follows:

The ninth factor is the alternatives to relocation and whether it is feasible and desirable for the other party to relocate also.

The father is a Canadian citizen, he has a job in Canada. It is not clear that he could relocate but the court does find that it is not reasonable for him to relocate to Japan and that factor weighs against relocation.

2.3.10 The financial impact and logistics of relocation or its prevention.

Does apply. Explain:

The last factor is the financial impact and logistics of relocation or its prevention.

The petitioner will earn a significantly greater salary. The cost of living in Japan is somewhat greater. There would be increased travel costs for both. It is somewhat difficult to evaluate how that would come out on the monetary scale.

Both parties have good jobs here. The petitioner's job obviously is a problem given her last poor review, there is a desirability in terms of that financial impact for her obviously to look for a better job where she is not worrying about the poor review.

The transportation costs would be high from Japan to Canada.

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2 The court would conclude that this factor is also even, given the various  
3 competing interests.

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12 **2.4 Findings Regarding Objection to Relocating Party's Proposed Parenting**  
13 **Plan/Residential Schedule**

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15 When the court looks at all of the factors in their entirety the court concludes that  
16 the presumption is overcome by the evidence, that the detrimental effects of  
17 relocation outweigh the benefits, and the court denies relocation in this case,  
18 considering the needs of the child, the lack of good faith, the unavailability of  
19 alternatives, and all the factors the court has laid out.

20  
21 Under the statute, the petitioner has the choice of whether she chooses to  
22 relocate or not and if she does not the court does not have any ability to modify  
23 the parenting plan.

24  
25 The Objection to Relocation/Petition for Modification of Custody  
Decree/Parenting Plan/Residential Schedule is granted. However, because the  
petitioner rescinded the Notice of Intent to relocate and no longer intends to  
relocate, the court does not have the ability to modify the parenting plan.

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Does not apply.

**III. Order**

*It is Ordered:*

**3.1 Objection to Relocation**

When the court looks at all of the factors in their entirety the court concludes that  
the presumption is overcome by the evidence, that the detrimental effects of  
relocation outweigh the benefits, and the court denies relocation in this case,  
considering the needs of the child, the lack of good faith, the unavailability of  
alternatives, and all the factors the court has laid out.

The relocating party is restrained from relocating the child.

**3.2 Parenting Plan**

Under the statute, the petitioner has the choice of whether she chooses to  
relocate or not and if she does not the court does not have any ability to modify  
the parenting plan.

Because the petitioner rescinded the Notice of Intent to relocate and no longer

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intends to relocate, the court does not have the ability to modify the parenting plan.

The previously entered custody decree/parenting plan/residential schedule signed by the court dated on 6/29/2012 shall remain in effect.

**3.3 It is Further Ordered**

The Order of Child Support signed by the court dated on July 5, 2012 in King County shall remain in effect.

The court reserves ruling on the father's request for attorneys fees. The father is to submit a motion requesting attorney's fees and the court will rule on the issue of fees when it hears the motion.

The court declines to re-allocate the fees that need to be paid to Dr. Melanie English for the initial evaluation. Ms. Kawabata shall pay the outstanding fees for the initial evaluation to Dr. Melanie English. Each party shall pay half of the fees for the trial testimony and preparation.

Dated: 1/10/2013

*J. Rutschel*  
Judge/Commissioner

Presented by:  
*Virginia M. Onu*  
Virginia M. Onu, WSBA 35717  
Attorney for Respondent

Approved by:  
*D. W. Kitchell*  
David Kitchell, WSBA 25817  
Attorney for Petitioner

Presented by:  
\_\_\_\_\_  
Respondent

Approved by:  
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Petitioner

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**Superior Court of Washington  
County of King**

In re the Marriage of:  
  
CHIE KAWABATA  
  
And  
  
KRISTOFFER G. MORNESS  
  
Respondent.

**No. 11-3-00982-7 SEA**  
  
**Order Granting Motion for Fees  
and Sanctions and Granting  
Judgment**

**Clerk's Action Required**

**Money Judgment Summary:**

- A. Judgment creditor Kristoffer G. Morness
- B. Judgment debtor Chie Kawabata
- C. Principal judgment amount \$ 0.00 \_\_\_\_\_
- D. Interest to date of judgment \$ 0.00 \_\_\_\_\_
- E. Attorney fees \$ 17,263.86 \_\_\_\_\_
- F. Costs \$ 0.00 \_\_\_\_\_
- G. Other recovery amount \$ 0.00 \_\_\_\_\_
- H. Principal judgment shall bear interest at \_\_\_\_\_ % per annum
- I. Attorney fees, costs and other recovery amounts shall bear interest at 12 % per annum

ORDER GRANTING MOTION FOR FEES AND  
SANCTIONS

VIRGINIA M. ONU, INC., P.S.  
11033 NE 24<sup>th</sup> Street, Suite 200  
Bellevue, WA 98004  
Phone: 425-451-1202 ext. 3030  
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1 J. Attorney for judgment creditor Virginia M. Onu  
2 K. Attorney for judgment debtor ~~David Kitchin~~ Kristilyn Reese  
3 L. Other:  
4

5 THIS MATTER having come before the court on the motion of the respondent for  
6 attorney's fees and sanctions,

7 AND THE COURT having reviewed the pleadings,  
8 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:  
9 Respondent's motion for attorney's fees and sanctions is granted.

10 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Father is  
11 awarded attorney's fees against mother in the amount of \$ 17,263.86.

12 The basis of the award for fees is RCW 26.09.550, as explained more fully below:  
13 The court is going to rely on 26.09.550 and intransience.

14 The court relies primarily on the arbitrator's finding that the  
15 mother had not been candid during the arbitration.

16 The court relies on the CPS reports in this way:

17 First of all, one report had been made, when the  
18 mother knew very well that the child had not been with the  
19 father for a substantial period of time, so any allegations  
20 could not have come from the father's time with the child.

21 There was the timing of the appointment, where she  
22 waited for, as I believe the testimony was, over a month  
23 and then took the child to the therapist. And the timing was  
24 as the relocation notice was served.

25 There was the use of the therapist for the referrals to  
26 CPS. The timing of those reports coincided with important  
27 parts of these actions.

28 ORDER GRANTING MOTION FOR FEES AND  
SANCTIONS

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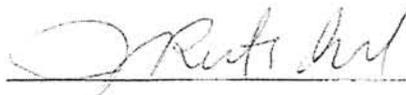
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The court has to find from all of the evidence, that she negotiated and settled the dissolution while she was contemplating the relocation, that this was a long-planned and orchestrated move, that there was non-compliance with discovery requests in the relocation, that she admitted at trial that she had planned the relocation, and that there were instances where she left the child while she traveled for long periods of times with a baby-sitter who had not previously had any real contact with the child rather than using the father.

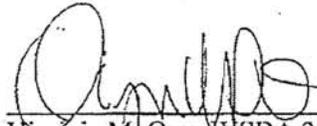
The court finds from those that based on the basis of intransigence and 26.09.550 that the father is entitled to attorney's fees.

The court also finds, however, that the actual illness of her mother was an intervening event that would be a good-faith motive for relocation and that that did have an impact on the mother's reasons, so it is somewhat of a confusing pattern, but in equity, the court believes it is appropriate to award the father half of his attorney's fees, so the court would award half of the fees that are requested given the totality of the situation.

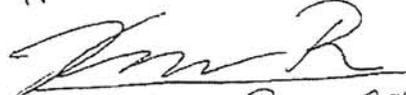
DATED THIS THE 11 of 3, 2013.

  
\_\_\_\_\_  
Judge

Presented by:

  
\_\_\_\_\_  
Virginia M. Onu, WSBA 35717  
Attorney for Respondent

Approved by:

  
\_\_\_\_\_  
Kristilyn Reese 38938  
Attorney for Petitioner

ORDER GRANTING MOTION FOR FEES AND SANCTIONS

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